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Supreme Court U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

AJ, a minor child by his father JOEL D. JOSEPH and JOEL D. JOSEPH, Petitioners,

v.

MICHAEL W. SKOJEC, GALLAGHER, EVELIUS & JONES, LLP, BOZZUTO MANAGEMENT CO., and HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an apartment building (owned by a county) with a policy that requires tenants to obtain permission prior to engaging in the door-to-door leafleting, violate the First Amendment protection accorded to pamphleteering?

2. Does 42 U.S.C. §1988(b) allow a court to award attorney's fees to a prevailing defendant when the 42 U.S.C. §1983 complaint was brought in good faith and was not groundless?

3. Does the "right to be let alone" implied from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) override the First Amendment's right to hand out leaflets?

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IN THE
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OCTOBER TERM, 2005

AJ, a minor child by his father JOEL D. JOSEPH and JOEL D. JOSEPH, Petitioners,

v.

MICHAEL W. SKOJEC, GALLAGHER, EVELIUS & JONES, LLP, BOZZUTO MANAGEMENT CO., and HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 5, 2006 and on March 28, 2006.

OPINION BELOW

The opinion of the Court of Appeals, reported at 2006 U.S. App. LEXIS 227, 161 Fed. Appx. 283, and appears in the appendix.

JURISDICTION

The judgment of the court of appeals for the Fourth Circuit was entered on January 5, 2006. A timely petition for rehearing *en banc* was denied on March 28, 2006, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights (Civil Rights Act of 1871)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 29-33 of the Montgomery County Code

(c) Tenants and resident tenant organizations have the right to distribute freely and post in centrally located areas of rental housing literature concerning landlord-tenant issues if the origin of the literature is properly identified.

STATEMENT OF THE CASE

The petitioners were tenants of the Metropolitan apartment building. This apartment building is owned by the Montgomery County Housing Opportunities Commission, a Maryland state governmental entity. The building in question is managed by Bozzuto Management.

Petitioners handed out 300 leaflets to fellow tenants at this apartment building. Immediately thereafter, petitioners were threatened with eviction for exercising their First Amendment rights by Michael W. Skojec, attorney for Bozzuto Management.

Petitioners brought this action under 42 U.S.C. §1983. The respondents filed a motion to dismiss. The district court granted the motion, ruling that the right of other tenants "to be left alone" overrode the constitutional right to hand out leaflets. App. 3, 8. The court also awarded attorneys' fees of $13,750, together with costs of $2,199.01 against plaintiffs. The Court of Appeals for the Fourth Circuit affirmed, and has granted an additional award of attorneys' fees. App. 1, 3.

REASONS FOR GRANTING THE WRIT

As Justice Scalia warned in *Hill v. Colorado,* 530 U.S. 703 at 748, 749 (2002), the First Amendment has become a dead letter when the "right to be left alone" trumps the right to free speech. The Fourth Circuit has punished petitioners for handing out leaflets door-to-door. To add insult to this constitutional injury, and create a frigid chilling of the right to exercise First Amendment rights, the circuit court upheld the district court's award of attorneys' fees against the leafleteers. In addition, the circuit court decided to add additional attorneys' fees. The Fourth Circuit's ruling is dangerous and has obliterated the First Amendment right to distribute leaflets door-to-door.

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

"For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. *Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610 (1976); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296(1940); *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938)." *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002).

This country was founded on the basis of the free distribution of leaflets. Thomas Paine distributed 500,000 copies of his pamphlet *Common Sense* in 1776. In 1775 Virginia patriot Patrick Henry said, "give me liberty or give me death." Did these patriots risk their lives and limbs only to have the First Amendment become meaningless? Justice Scalia, in his dissent in *Hill v. Colorado*, 530 U.S. 703 at 748, 749 (2002) emphasized, "if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, ***the First Amendment is a dead letter***." (emphasis added.)

It has long been recognized in the United States that citizens have a First Amendment right to distribute leaflets. While the Supreme Court has allowed limits on First Amendment rights concerning the time, place and manner of speech, this case does not involve any of the exceptions to unfettered free speech.

This court has discussed extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas. In *Schneider* v. *New Jersey (Town of Irvington)*, 308 U.S. 147 (1939), the petitioner had been convicted of canvassing without a permit based on evidence that she had gone from house to house

offering to leave books or booklets. Writing for the Court, the first Justice Roberts stated that:

> ***pamphlets have proved most effective instruments in the dissemination of opinion.*** And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the ***free and unhampered*** distribution of pamphlets strikes at the very heart of the constitutional guarantees. *Id.*, at 164 (emphasis added).

In *Lovell v. Griffin,* 303 U.S. 444, 450 (1938), the Supreme Court, in a decision joined by Justice Brandeis, ruled:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its connotation comprehends every sort of publication which affords a vehicle of information and opinion.

The District Court ruled that the "right to be let alone," that he inferred from the Metropolitan's "rules" regarding distribution of leaflets, allowed respondents to restrict and

threaten retaliation for petitioners' right to free speech. App. 8.

However, the County passed an ordinance, see page 2, that created a right for tenants in the county, whether in a county-owned building or a privately-owned building to hand out leaflets door-to-door. The district court ruled that fellow tenants' right to privacy trumped the right of petitioners to hand out leaflets door-to-door. The district court ruled:

> It is clear from the entirety of defendants' communications to plaintiffs regarding plaintiffs' arguable exercise of a first amendment right to communicate with their co-tenants that, as a matter of law, defendants were seeking to accommodate not just plaintiffs' right to speak, but their co-tenants' "right to be let alone." *Olmstead v. United States,* 277 438, 478 (1928) (Brandeis, J., dissenting.

It has never been held by the United States Supreme Court that an implied right to privacy trumps the First Amendment-protected right to leaflet door-to-door. In fact, Justice Brandeis, creator of the right to privacy, joined the court's majority in many cases upholding the right to leaflet door-to-door, including *Lovell v. Griffin, supra.* Justice Brandeis, also, would be shocked to learn that the right to privacy, which he felt protected individuals against governmental intrusion, was allowed to overturn the First Amendment right to hand out leaflets.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING ATTORNEYS' FEES AWARDED TO DEFENDANTS IN CIVIL RIGHTS CASES.

In *Christianburg Garment Co. v. EEOC,* 434 U.S. 412 (1978) this court held that the defendant in a Title VII action

can recover attorneys' fees from plaintiff only if the District Court finds, "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. In *Hughes v. Rowe*, 449 U.S. 5 (1980), this court applied a similar standard to actions brought under 42 U.S.C. §1983. The court in *Hughes* ruled that the defendant could not be awarded attorneys' fees unless the case was "meritless in the sense that it is groundless or without foundation." 449 U.S. at 14. This court expressly ruled in *Hughes* that plaintiffs should be encouraged to bring civil rights cases. The ruling of the Fourth Circuit below will serve only to chill the rights of those considering bringing civil rights cases.

This court has not, but should, define what it means by a "frivolous," "meritless," and a "groundless," as well as a case "case without foundation."

The district court and the Fourth Circuit found that petitioners' complaint was worthy of the sanction of an award of attorneys' fees and found it to be "frivolous."

The term "frivolous" cannot be defined with great precision. Note, Penalties for Frivolous Appeals (1929) 43 Harv.L.Rev. 113, 114 ["The frivolous appeal seems elusive of definition"]. "Frivolousness, like madness and obscenity, is more readily recognized than cogently defined." Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701, at 705 (footnote omitted).

" 'Any definition [of frivolous] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights . . . . Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . . ***[A claim] that is simply without merit is not by definition frivolous and should not incur sanctions.*** Counsel should not be deterred from filing such [claims] out of a fear of reprisals.'" *California Teachers Assn. v. State of California*, 20 Cal.4th 327, 340, 975 P.2d 622, 84 Cal. Rptr. 2d 425 (California Supreme Court, 1999),

quoting *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179.) (Emphasis added).

Vague definitions of what constitutes a frivolous appeal raise the danger that plaintiffs and attorneys will be deterred from asserting valid claims out of a fear that they will incur court sanctions.

Due process requires that certain basic procedural protections be afforded before a court deprives an individual of property. (See *Wolff v. McDonnell* (1974) 418 U.S. 539, 557-558.) For this reason, this court should define what is "frivolous," "groundless" and "meritless" so that plaintiffs and their attorneys know the rules before sanctions are imposed.

CONCLUSION

This court should grant certiorari to protect the right of petitioners and others to distribute leaflets door-to-door, a fundamental constitutional right that must not be infringed.

Similarly, this court should grant certiorari to review the award of attorneys' fees against a civil rights plaintiff wrongfully accused of filing a "frivolous" complaint. "Is it frivolous to file a complaint when a tenant is threatened with eviction for handing out leaflets?" Not only is it not frivolous, such a complaint would have been applauded by the Founding Fathers who wrote the First Amendment to protect leafleteers and others who wished to exercise their right of Free Speech.

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

2006 U.S. App. LEXIS 227, 161 Fed. Appx. 283

AJ, a minor child by his father Joel D. Joseph; JOEL D. JOSEPH, Plaintiffs - Appellants,

versus

MICHAEL W. SKOJEC; GALLAGHER, EVELIUS & JONES, LLP; BOZZUTO MANAGEMENT COMPANY; HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, MARYLAND, Defendants - Appellees.

No. 05-1419

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

December 12, 2005, Submitted

January 5, 2006, Decided

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (CA-04-4069-1-AMD).

Joseph v. Skojec, 2005 U.S. Dist. LEXIS 6908 (D. Md., Feb. 22, 2005); Joseph v. Skojec, 2005 U.S. Dist. LEXIS 6909 (D. Md., Apr. 22, 2005)

COUNSEL: Joel D. Joseph, Bethesda, Maryland, for Appellants.

Peter E. Keith, Brian T. Tucker, GALLAGHER EVELIUS & JONES, LLP, Baltimore, Maryland; George M. Church, MILES & STOCKBRIDGE, PC, Baltimore, Maryland; Charles W. Thompson, Jr., County Attorney, Joann Robertson, Chief, Division of Litigation, Karen L. Federman Henry, Principal Counsel for Appeals, Patricia P. Via, Associate County Attorney, Rockville, Maryland, for Appellees.

JUDGES: Before LUTTIG and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION: PER CURIAM:

Appellants appeal the district court's orders granting Defendants' motion to dismiss Appellants' 42 U.S.C. § 1983 (2000) action, and awarding attorneys fees to Defendants. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Joseph v. Skojec*, 2005 U.S. Dist. LEXIS 6909, No. CA-04-4069-1-AMD (D. Md. Feb. 22 & Apr. 22, 2005). We deny Appellants' motion for an injunction as moot. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

FILED: 3/28/06

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1419
(CA)-4-4069-1-AMD

AJ, A minor child by his father Joel D. Joseph; JOEL D. JOSEPH, Plaintiffs - Appellants,

versus

MICHAEL W. SKOJEC; GALLAGHER, EVELIUS & JONES, LLP; BOZZUTO MANAGEMENT COMPANY; HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, MARYLAND, Defendants - Appellees.

ORDER

Appellants' petition for rehearing en banc has been circulated to all members of the Court. Since no judge of the Court has called for a vote on Appellants' petition, it is DENIED.

Appellees have filed a motion for sanctions under Fed. R. App. P. 38. We grant the motion. Appellees are hereby directed to submit an itemized statement of attorneys' fees and costs within ten days. Appellants shall file any objection to Appellees' itemized statement within fourteen days after service of Appellees' statement.

For the Court
/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEX JOSEPH and JOEL D. JOSEPH,

Plaintiffs

v. CIVIL NO. AMD 04-4069

MICHAEL W. SKOJEC, et al.,

Defendants

MEMORANDUM OPINION

Plaintiffs Alex and Joel D. Joseph are tenants in an apartment building in Montgomery County. At the times relevant to this case, Alex was 17 years old. His father, plaintiff Joel D. Joseph, is an attorney. The plaintiffs' apartment complex, known as the Metropolitan Apartments, is owned by defendant Housing Opportunities Commission of Montgomery County (a governmental entity), and is managed by defendant Bozzuto Management Company. Defendant Michael W. Skojec is a member of the law firm (which is also named as a defendant) representing Bozzuto. According to the complaint (and the exhibits attached thereto), a dispute arose between plaintiffs and Bozzuto in respect to alleged disruptive behavior by the minor plaintiff in or about the public areas of the apartment complex, including the rooftop deck. As a result of the dispute, plaintiff Alex Joseph distributed a questionnaire to all tenants in which plaintiffs sought to conduct a survey of tenant views on the idea of having Bozzuto open the building's rooftop deck on a year-round basis. *Compl., Exh. 1.* When Bozzuto learned of plaintiffs' distribution of the tenant survey, Bozzuto objected. Skojec, at Bozzuto's direction, delivered a letter to plaintiffs warning plaintiffs, *inter alia*, that the tenant questionnaire

constituted a "solicitation," that "solicitation" without management approval was prohibited by the plaintiffs' lease, and specifically demanded that the "solicitations" "immediately cease." *Compl., Exh. 2.*[1] In addition, Skojec's letter alleged that the rooftop deck "solicitation" contained "incomplete and thus, . . . false information," and that such "false statements" made "in order to interfere with the management of the property may . . . be independently actionable." *Id.*

The letter ended with an explicit threat that "if there are any further violations of [lease] . . . you will be immediately notified that the lease is terminated and appropriate legal action taken to enforce the termination." *Id.*

Upon his receipt of the letter, Joel Joseph wrote to Skojec announcing his intention to file this law suit, and described the Skojec letter as "outrageous, illegal, libelous and harassing." In particular, Joseph alleged that the Skojec letter violated the Montgomery County Code, and that it was "threatening, coercive and harassing." Skojec promptly responded to plaintiffs' letter disputing the plaintiffs' characterization of his first letter. In his response, Skojec stated the following, in part:

> [W]hile the Montgomery County Code permits the distribution of rental housing literature by tenants, it does not address solicitation of other residents in surveys that are delivered into other residents' units without their permission, nor does it prohibit management from asking tenants to present their literature and concerns to management first. If your son was only handling out

1. The letter was addressed to "Harold Joseph c/o Joel Joseph." Harold Joseph is the father of Joel and the grandfather of Alex and the named lessee. There is no dispute, however, that Joel and Alex are lawful residents in the leased premises.

> literature to residents that suggested that the residents encourage management to open the roof deck more often, had your permission as his parent, and had advised management first that he would distribute literature in a way that did not disturb residents, he may have been permitted to do so. But that is not what happened. Apparently, your son was distributing the questionnaires by sliding them under the doors into apartment units. Some of the residents who received them complained to management and asked that the deliveries be immediately stopped. Compl., Exh. 4, at 1-2.

Thereafter, plaintiffs filed this action. In count one, plaintiffs purport to assert a first amendment retaliation claim pursuant to 42 U.S.C. § 1983 against all defendants; in count two, purport to assert a claim based on violations of the Montgomery County Code against defendant Housing Opportunities Commission of Montgomery County; they in count three they purport to assert a claim for fraud against defendants Bozzuto and Housing Opportunities Commission of Montgomery County; and in count four, they purport to assert a claim for libel (on behalf of the minor plaintiff) against all defendants. Plaintiffs seek declaratory relief and damages. Diversity of citizenship is lacking.

Defendants have now moved to dismiss the complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), and in particular, they contend (as to the sole federal claim), plaintiffs have not alleged a cognizable first amendment retaliation claim. Plaintiffs have filed an opposition memorandum. No hearing is needed.

I agree with defendants that plaintiffs have failed to assert a cognizable first amendment retaliation claim.[2]

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2. To prevail in an action brought under 42 U.S.C. § 1983, plaintiffs must show that they were deprived of a right secured by the Constitution or

laws of the United States, and that the defendant acted under color of

Asserting that they enjoy a "constitutional right to communicate with fellow tenants," plaintiffs contend that that right has been "chilled" by Bozzuto's threat to take legal action against them if they continue to engage in "solicitation" as construed in the Skojec letter. This contention is without merit.

To state a first amendment retaliation claim, plaintiff must allege facts sufficient, if believed, to establish the following elements:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotations omitted); *see also DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir.1995) ("Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory.").

As a matter of law, under no set of facts properly encompassed and proved under the allegations in this case could "a person of ordinary firmness" experience a chill of his or her first amendment right to communicate with co-tenants at the Metropolitan Apartments. Although Skojec's

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state law. *Conner v. Donnelly*, 42 F.3d 220, 223 (4th Cir. 1994); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214-15 (4th Cir.1993). A private entity can only be held liable under 42 U.S.C. § 1983 for activity that constitutes state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); *Hafer v. Melo*, 502 U.S. 21, 28 (1991). In the view that I take of the case, I need not determine whether the delivery of Skojec's letter to plaintiffs constituted "state action."

first letter was stark, his second letter fully explained the basis for the first letter:

> If your son was only handling out literature to residents that suggested that the residents encourage management to open the roof deck more often, had your permission as his parent, and had advised management first that he would distribute literature in a way that did not disturb residents, he may have been permitted to do so. But that is not what happened. Apparently, your son was distributing the questionnaires by sliding them under the doors into apartment units. Some of the residents who received them complained to management and asked that the deliveries be immediately stopped .

It is thus clear from the entirety of defendants' communications to plaintiffs regarding plaintiffs' arguable exercise of a first amendment right to communicate with their co-tenants that, as a matter of law, defendants were seeking to accommodate not just the plaintiffs' right to speak, but their co-tenants' "right to be let alone." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In short, as a matter of law, no retaliatory "chill" to the exercise of first amendment.

Accordingly, I shall grant with prejudice defendants' motions to dismiss the first amendment retaliation claim. I shall decline to exercise supplemental jurisdiction over the state law claims and, in the absence of diversity of citizenship, I shall dismiss those claims without prejudice.

An order follows.

Filed: February 22, 2005

/s/
ANDRE M. DAVIS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEX JOSEPH and JOEL D. JOSEPH,

Plaintiffs

v. CIVIL NO. AMD 04-4069

MICHAEL W. SKOJEC, et al.,

Defendants

MEMORANDUM OPINION

Now pending is the Motion for Attorney's Fees and Expenses filed on behalf of the non-governmental defendants in this action filed by plaintiffs Alex and Joel D. Joseph pursuant to 42 U.S.C. § 1983. In a memorandum Opinion filed on February 22, 2005, the court granted defendants' motion to dismiss the federal claim and dismissed that claim with prejudice. The state law claims were dismissed without prejudice. Plaintiff has noted a timely appeal from that order.

Plaintiff Joel D. Joseph, Esq., is an attorney who filed the action on his own behalf and on behalf of his 17 year old son, Alex. The plaintiffs took umbrage at a letter delivered on behalf of the management company of their apartment building, defendant Bozzuto Management Company, by an attorney, defendant Michael W. Skojec, Esq. The letter admonished the Josephs for alleged improper behavior by the younger plaintiff, and threatened that if there were "any further violations of [lease] . . . you will be immediately notified that the lease is terminated and appropriate legal action taken to enforce the termination." *Id.*

Upon his receipt of the letter, plaintiff Joel Joseph wrote to Skojec announcing his intention to file this law suit, and described the Skojec letter as "outrageous,

illegal, libelous and harassing." In particular, Joel Joseph alleged that the Skojec letter violated the Montgomery County Code, and that it was "threatening, coercive and harassing." Skojec promptly responded to the letter, disputing the plaintiffs' characterization of his first letter.

In his response, Skojec stated the following, in part:

> [W]hile the Montgomery County Code permits the distribution of rental housing literature by tenants, it does not address solicitation of other residents in surveys that are delivered into other residents' units without their permission, nor does it prohibit management from asking tenants to present their literature and concerns to management first. If your son was only handling out literature to residents that suggested that the residents encourage management to open the roof deck more often, had your permission as his parent, and had advised management first that he would distribute literature in a way that did not disturb residents, he may have been permitted to do so.

But that is not what happened. Apparently, your son was distributing the questionnaires by sliding them under the doors into apartment units. Some of the residents who received them complained to management and asked that the deliveries be immediately stopped. Compl., Exh. 4, at 1-2.

Thereafter, plaintiffs filed this action. In count one, the sole federal claim, plaintiffs purported to assert a first amendment retaliation claim pursuant to 42 U.S.C. § 1983. Defendants moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), asserting that plaintiffs had not alleged a cognizable first amendment retaliation claim.

In granting the motion to dismiss the first amendment claim with prejudice, I reasoned as follows:

> I agree with defendants that plaintiffs have failed to assert a cognizable first amendment retaliation claim. Asserting that they enjoy a

"constitutional right to communicate with fellow tenants," plaintiffs contend that that right has been "chilled" by Bozzuto's threat to take legal action against them if they continue to engage in "solicitation" as construed in the Skojec letter. This contention is without merit.

To state a first amendment retaliation claim, plaintiff must allege facts sufficient, if believed, to establish the following elements:

(1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000) (quotations omitted); *see also DiMeglio v. Haines,* 45 F.3d 790, 806 (4th Cir.1995) ("Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory."). As a matter of law, under no set of facts properly encompassed and proved under the allegations in this case could "a person of ordinary firmness" experience a chill of his or her first amendment right to communicate with co-tenants at the Metropolitan Apartments. Although Skojec's first letter was stark, his second letter fully explained the basis for the first letter:

> If your son was only handling out literature to residents that suggested that the residents encourage management to open the roof deck more often, had your permission as his parent, and had advised management first that he would distribute literature in a way that did not disturb residents, he may have been

> permitted to do so. But that is not what happened. Apparently, your son was distributing the questionnaires by sliding them under the doors into apartment units. Some of the residents who received them complained to management and asked that the deliveries be immediately stopped.

It is thus clear from the entirety of defendants' communications to plaintiffs regarding plaintiffs' arguable exercise of a first amendment right to communicate with their co-tenants that, as a matter of law, defendants were seeking to accommodate not just the plaintiffs' right to speak, but their co-tenants' "right to be let alone." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In short, as a matter of law, no retaliatory "chill" to the exercise of first amendment rights arises from the Skojec letters. Mem. Op. at 3-4 (footnote omitted).

Defendants have now moved for an award of attorney's fees and costs pursuant to 42 U.S. C. §1988(b). No hearing is necessary.

The standards for an award of attorney's fees and costs to a prevailing defendant under §1988(b) are well-settled:

> As amended, 42 U.S.C. § 1988(b) provides in pertinent part, "In any action or proceeding to enforce a provision of section . . . 1983 the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."
>
> Section 1988(b) is part of the Congressional scheme to promote enforcement of constitutional and civil rights law by private parties. *Hughes v. Rowe,* 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980); *see also Christiansburg Garment Company v. EEOC* ,434 U.S. 412, 418, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)(setting standard for

attorney's fees awards to defendants in actions under Title VII of the Civil Rights Act of 1964). Thus, a different standard applies to determine whether fees will be awarded when a *defendant* prevails. As the Supreme Court explained, "[t]o take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote vigorous enforcement . . . ." *Id.* at 422, 98 S.Ct. 694. Congress specifically intended the attorney's fees provision to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Id.* at 420, 98 S.Ct. 694. A second factor cited by the Supreme Court as discouraging fee awards to defendants in civil rights suits is the fact that an attorney's fee award to a prevailing plaintiff is an award "against a violator of federal law." *Id.* at 418, 98 S.Ct. 694.

The absence of these factors when a defendant prevails in such cases dictates that an award of attorney's fees to a defendant must be based on the "quite different equitable considerations," *id.* at 419, 98 S.Ct. 694, of discouraging groundless lawsuits. *Id.* at 420, 98 S.Ct. 694. Hence, "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claimwas frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421, 98 S.Ct. 694. *See also DeBauche v. Trani,* 191 F.3d 499, 510 (4th Cir.1999); *Bryant Woods Inn, Inc.,* 124 F.3d at 606. "In applying these criteria,"

> the Supreme Court cautioned, "it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22, 98 S.Ct. 694.

Greenspring Racquet Club, Inc. v. Baltimore County, MD, 77 F.Supp.2d 699, 702 (D. Md. 1999)(footnote omitted), *vacated on other grounds*, 2000 WL 1624496 (4th Cir. Oct. 31, 2000), *cert. denied*, 532 U.S. 957 (2001); *see also Lotz Realty Co., Inc. v. United States Dept. Of Housing and Urban Dev.*, 717 F.2d 929, 932 (4th Cir.1983).

Application of the above principles to this case yields but one conclusion. Particularly in view of the fact that this action was instituted by an attorney acting pro se, the frivolousness of the federal claim brought here is palpable. The court has no hesitation in concluding that an award of attorney's fees and costs is not only warranted but positively imperative as an appropriate response to plaintiffs' vexatiousness.

Plaintiffs have not challenged the hourly rates or the number of hours claimed by defendants in their application for fees and costs beyond the conclusory assertion that "[i]f the plaintiffs' complaint was truly frivolous it should not have taken more than 100 hours of lawyers' time to file a motion to dismiss." Defendants claim a total of 150 hours of attorney time (32.6 of which were expended on the fee petition) at hourly rates ranging from $140 to $380, together with a paralegal rate of $120. (Defendants have declined to tease out their hours devoted to the challenge to the federal claim, contending that the state law claims arose from the same core of operative facts.) The total fee requested is $25,288.00, with expenses of $2199.01. Defendants have not separately scheduled the hours for each attorney; thus, the court is not able to determine, without itself scheduling the work of each attorney the number of hours devoted to the

case by each such attorney. *See* Rules of the United States District Court (Md.), Appendix B, *Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases*. The court does not wish to impose an unreasonable burden on the adult plaintiff (and this is so even though the plaintiff claims that his own customary rate is $500 per hour). Nor does the court find it appropriate to make an award for work performed on the state law claims that were dismissed without prejudice. On the other hand, the court is convinced that plaintiff's decision to appeal is of a piece with the misguided decision to file this action in the first instance. Accordingly, on the basis of whole record, and in the exercise of an informed discretion, the court shall make a partial award of fees, for 55 attorney hours at the blended rate of $250 per hour. Thus, the award shall be in the amount of $13,750, together with costs of $2199.01. An order follows.

Filed: April 22, 2005

/s/
ANDRE M. DAVIS
United States District Judge